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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN BUCKLEY, PETITIONER

v.

MICHAEL FITZSIMMONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a state prosecutor is entitled to absolute immunity from a Section 1983 damages suit alleging that his pre-indictment investigation and his public statements resulted in wrongful indictment, arrest, and detention pending trial.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in questions of prosecutorial immunity. Although federal officers are not subject to suit under 42 U.S.C. 1983, they may be sued on an implied right of action for violations of constitutional rights. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has indicated that the scope of immunity available to federal officers in such an action is similar to that available to state officials sued under Section 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Thus, the disposition of the issues in this case may

affect the liability of federal prosecutors sued for damages as a result of actions taken in the performance of their official duties.

STATEMENT

Petitioner Stephen Buckley challenges a decision of the court of appeals holding that state prosecutors who indicted and tried him are in large part absolutely immune from a suit for damages brought under the Civil Rights Act of 1871, 42 U.S.C. 1983. The court specifically rejected petitioner's contention that a prosecutor is subject to suit for pre-indictment activities, such as interviewing potential expert witnesses, that resulted in petitioner's indictment, arrest, and detention pending trial. The court also rejected petitioner's contention that a prosecutor is subject to suit for public statements that affect the course of the criminal proceedings.

1. As the courts below, we accept as true for present purposes the relevant factual allegations contained in petitioner's complaint. See J.A. 26-38, 69-75.

a. The complaint states that on February 25, 1983, 11-year-old Jeanine Nicarico was abducted from her home in Naperville, Illinois, sexually abused, and murdered. J.A. 6. When her body was found several days later, the DuPage County Sheriff's Office, under the direction of Richard Doria, and the DuPage County State's Attorney's Office, under the direction of respondent Michael Fitzsimmons, launched an intensive investigation into the crime. J.A. 6-7.

Early in the investigation, detectives discovered a bootprint on the door of the Nicaricos' home, and they concluded that the murderer had kicked in the door. J.A. 7. At about the same time, Alex Hernandez, an acquaintance of petitioner's, told investigators that he had overheard a conversation in which petitioner discussed the murder. J.A. 7. Detectives went to petitioner's home and questioned him. He denied any knowledge of the crime and voluntarily gave the officers his boots. J.A. 7. Sergeant John Gorayczky, who worked in the DuPage County Crime Lab, compared petitioner's boots with the bootprint from the Nicaricos' door and concluded that they did not match. J.A. 7-8. Sheriff Doria, State's Attorney Fitzsimmons, and other respondents sought out the opinions of other experts. J.A. 8.

Respondent Edward German, who worked at the Illinois Department of Law Enforcement Crime Lab, determined that petitioner's boots could have made the print. J.A. 8. Respondent Robert Olsen, from the Kansas Bureau of Investigation's Crime Lab, concluded that the boots and the print had "similar class characteristics," but lacked sufficient "individual characteristics" to make a positive identification. J.A. 8-9. Professor Louise Robbins, an anthropologist at the University of North Carolina, declared positively that the boots matched the bootprints. J.A. 9. During that period, the deputy sheriffs and assistant state's attorneys continued to question suspects, including Hernandez and petitioner. Petitioner continued to maintain his innocence. J.A. 9-10.

The DuPage County authorities convened a grand jury to investigate the crime. See Ill. Ann. Stat. ch. 38, para. 112 (Smith-Hurd 1980) (describing composition and impanelment of grand juries). Various suspects, including petitioner, testified. The prosecutors questioned the suspects and presented the bootprint evidence. According to petitioner, they omitted Gorayczky's conclusions, misrepresented those of Ol-

sen and German, and "presented a large amount of obviously incredible, irrelevant, false, and contradictory hearsay and double hearsay evidence designed to improperly prejudice [petitioner]." J.A. 11. The prosecutors also solicited testimony from Hernandez and another suspect, Rolando Cruz, that inculpated petitioner. J.A. 11.

On January 27, 1984, Fitzsimmons publicly stated that the grand jury lacked sufficient evidence to indict. J.A. 11. Nevertheless, on March 9, 1984, the grand jury returned an indictment of petitioner, Hernandez, and Cruz on charges of murder, rape, and burglary. Fitzsimmons, who was seeking renomination for State's Attorney in a local primary election, announced the indictments at a press conference. J.A. 12. He asserted that considerable evidence (including the bootprint evidence) tied petitioner and the other defendants to the crime. Further, Fitzsimmons claimed that the defendants were all part of a burglary ring and released "mug shots" of them. J.A. 12.

b. Illinois law provides that upon the filing of an indictment in open court, "the court shall immediately issue a warrant for the arrest of each person charged with an offense." Ill. Ann. Stat. ch. 38, para. 112-2(d) (Smith-Hurd 1980 & Supp. 1992). Petitioner and his co-defendants were arrested and taken before a judicial officer. Under Illinois law in effect at that time, a person "charged with murder, aggravated kidnapping or treason has the burden of proof that he should be admitted to bail." Ill. Ann. Stat. ch. 38, para. 110-4(b) (Smith-Hurd 1980). The court set bail in the amount of $3 million. J.A. 12-13. Unable to post bail in that amount, petitioner remained in custody. J.A. 14.

Petitioner continued to maintain his innocence, and Hernandez retracted his prior statements, saying he made them to obtain a reward offered for information concerning the crime. J.A. 13. In March 1984, respondent James Ryan defeated Fitzsimmons in the primary election for DuPage County State's Attorney, and Ryan won the general election the following November. J.A. 14. Ryan continued the prosecution in the Nicarico case. In January 1985, a jury was selected and petitioner, Cruz, and Hernandez were tried. Cruz and Hernandez were convicted, but the jury was unable to reach a unanimous verdict concerning petitioner. The court declared a mistrial, and the DuPage County authorities declared publicly that petitioner would be retried. J.A. 14-15.

c. In June 1985, Illinois authorities in Kane and LaSalle Counties charged an individual named Brian Dugan with several sexual assaults, including the rape and murder of a seven-year-old girl. J.A. 15-16. Dugan told his public defender that he had committed not only that crime, but two others, including the rape and murder of Jeanine Nicarico. J.A. 16. In November 1985, DuPage County authorities received the details of Dugan's confession. J.A. 16. Dugan's attorney proposed that Dugan would plead guilty to all three rape-murders in exchange for life sentences. The Kane and LaSalle County prosecutors accepted that offer, but the DuPage County authorities decided instead to reprosecute petitioner for the rape and murder of Nicarico. J.A. 16-17.

The DuPage County authorities continued to detain petitioner during the preparations for a retrial, which was repeatedly postponed. J.A. 16-17. In January 1987, the authorities sought a continuance on the ground that Professor Robbins, a principal ex-

pert witness for the prosecution concerning the bootprint evidence, was seriously ill. Robbins died shortly thereafter, and in March 1987, the DuPage County authorities discontinued petitioner's pretrial detention and prosecution. J.A. 17-18.[1]

2. In March 1988, petitioner filed a six-count civil complaint in the United States District Court for the Northern District of Illinois, seeking damages under federal and state law from DuPage County, its prosecutors, the sheriff and deputy sheriffs, and the expert witnesses. See J.A. 19-24. Count 1, the relevant count for purposes of this case, seeks relief pursuant to the Civil Rights Act of 1871, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983.

Count 1 alleges that the prosecutors committed acts and omissions that "constitut[ed] false arrest

[1] The Illinois Supreme Court reversed the convictions of Hernandez and Cruz on *Bruton* grounds. See *People* v. *Hernandez*, 521 N.E.2d 25, cert. denied, 488 U.S. 869 (1988); *People* v. *Cruz*, 521 N.E.2d 18, cert. denied, 488 U.S. 869 (1988). The State reprosecuted those defendants. A jury convicted Cruz, and the Illinois Supreme Court has affirmed the jury's sentence of death. *People* v. *Cruz*, No. 70407 (Dec. 4, 1992) [1992 Ill. Lexis 221]. The jury was unable to reach a unanimous verdict with respect to Hernandez. J.A. 73.

and imprisonment," in violation of petitioner's rights under the Fourth and Fourteenth Amendments, and that "violated [petitioner's] right to a fair trial." J.A. 19. It alleges that the acts "were done to publicly prejudice and defame him" and "to cover up the Defendants' failure to solve the crime, to cover up their arrest, imprisonment and prosecution of the wrong men, and to further Defendant Fitzsimmons' and Doria's political career, in violation of [petitioner's] 14th Amendment right to due process of law." J.A. 19.

Count 1 of the complaint also alleges that those "due process violations" resulted in the jury deadlock, "thereby directly causing his continued imprisonment for an additional two years." J.A. 19. It asserts that the DuPage County authorities' "abuse of the grand jury process and its power to indict" violated petitioner's right to counsel and to remain silent under the Fifth, Sixth, and Fourteenth Amendments. J.A. 19. Count 1 further alleges that those acts and omissions, which allegedly were effectuated through a conspiracy, caused petitioner "pain, suffering, fear, mental anguish, humiliation, defamation, loss of work, loss of freedom, and out of pocket costs and expenses." J.A. 20. The complaint seeks $5 million in compensatory damages, and $3 million in punitive damages. J.A. 20.

3. The prosecutors named in petitioner's suit filed a joint motion to dismiss petitioner's action based on prosecutorial immunity. See J.A. 1. The district court granted that motion in large part. The court stated:

> The discussion of prosecutorial immunity must start of course with *Imbler* v. *Pachtman*, 424 U.S. 409 [(1976)], which established that a

> prosecutor is absolutely immune from a suit for damages under 42 U.S.C. § 1983 for alleged violation of constitutional rights committed in "initiating a prosecution and in presenting the state's case."

J.A. 40, quoting *Imbler*, 424 U.S. at 431. Applying the principles set forth in *Imbler*, the court concluded that virtually all of petitioner's allegations of prosecutorial misconduct were based upon actions taken by the prosecutor in "initiating a prosecution and in presenting the state's case." See J.A. 43-45.

The court specifically ruled that the prosecutor's pre-indictment activities, such as "securing opinions as to the value and relevance of existing evidence," were activities associated with the "judicial phase" of the prosecutor's duties and therefore entitled to absolute immunity. J.A. 45. It distinguished, however, the prosecutor's out-of-court public statements on the ground that they are not part of the prosecutor's judicial function and are entitled to only qualified immunity. J.A. 49-51. The court accordingly concluded that the prosecutors were absolutely immune from all of the claims contained in Count 1 of the complaint except "the claim of denial of constitutional right to a fair trial as a result of the pre-trial public announcements of defendant Fitzsimmons." J.A. 53.

4. Both petitioner and Fitzsimmons appealed the district court's immunity ruling. Relying principally on this Court's decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the court of appeals partly affirmed and partly reversed the district court's rulings. See J.A. 66-100. The court of appeals interpreted *Imbler* to hold that prosecutorial immunity "is absolute

only when the prosecutor performs distinctively prosecutorial functions." J.A. 84. It concluded that distinctively prosecutorial functions" include those " 'prosecutorial' acts" that the "criminal process itself" regulates to prevent harm, "so that damages remedies are unnecessary." J.A. 84-85.

The court suggested a "simple demarcation" between prosecutorial and non-prosecutorial functions:

> If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests. If, however, a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity.

J.A. 87-88. Thus, prosecutorial acts that "cause injury only to the extent a case proceeds will be brought to heel adequately by the court." J.A. 88, citing *Butz* v. *Economou*, 438 U.S. 478, 515-516 (1978).

The court applied its rule to petitioner's allegations and ruled that the prosecutors, including Fitzsimmons, are absolutely immune from a Section 1983 damages suit based on their public statements in this case. The court concluded that Section 1983 does not provide a cause of action for merely defamatory statements, J.A. 89 (citing *Paul* v. *Davis*, 424 U.S. 693 (1976)), and that the prosecutors are absolutely immune from petitioner's claims that the statements caused additional injury by "influenc[ing] the course of bail hearings or trial," J.A. 92.

The court similarly held that the prosecutors are absolutely immune from petitioner's claims relating

to the bootprint evidence, because "[o]btaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from what happens in court." J.A. 92-93. The court concluded, however, that petitioner's "allegation that assistant state's attorneys coercively interrogated *him* presents a different problem," because a coercive interrogation may inflict injury apart from the judicial process. J.A. 93. The court ruled that when "the injury from such tactics does not depend on the filing of an indictment or the conduct of trial, the prosecutors have no more than qualified immunity." J.A. 95.[2]

5. Petitioner sought a writ of certiorari, and this Court granted his petition, vacated the decision, and remanded the case for further consideration in light of the Court's decision in *Burns* v. *Reed*, 111 S. Ct. 1934 (1991), which held that prosecutors have only qualified immunity when giving legal advice to police. See J.A. 101. On remand, the court of appeals concluded that its prior decision was consistent with *Burns*. The court reiterated its ruling that prosecutors are immune from actions taken in consulting with expert witnesses, because no principled distinction can be made between preparation for trial and the trial itself. J.A. 103-105. The court explained that *Imbler* had recognized that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a

[2] Judge Fairchild dissented in part. J.A. 97-100. He concluded that a prosecutor's creation of prejudicial pretrial publicity may constitute a "constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage, such as a press conference, where the purposes to be served by immunity do not apply." J.A. 99-100.

prosecution," J.A. 105, quoting *Imbler*, 424 U.S. at 431 n.33, and that *Burns* had "quoted this language with approval," J.A. 105, citing *Burns*, 111 S. Ct. at 1941-1942.

The court also reiterated its conclusion that petitioner's defamation claims relating to the press conference were not actionable, immunity issues aside, because defamation is not a constitutional wrong under *Paul* v. *Davis*, *supra*. J.A. 105. The court concluded that "*Imbler* confers immunity" with respect to petitioner's additional claim that the resulting pretrial publicity deprived him of a fair bail hearing and trial, because the alleged harm "depends on judicial action." J.A. 106. "Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge." J.A. 106.

The court noted that a memorandum that petitioner filed after remand asserted that one or more of the assistant state's attorneys actually arrested him. The court concluded that a prosecutor's participation in an arrest, like participation in a coercive interrogation, may cause injury independent of the judicial process. The court accordingly modified its judgment to direct the district court to explore the allegation that the persons who arrested petitioner lacked probable cause. J.A. 109.[3]

[3] Judge Fairchild adhered to his earlier view that "there was no absolute immunity for the prosecutor's press conference." J.A. 109. Based on petitioner's allegations that Fitzsimmons played a "very aggressive role" in seeking expert testimony, he additionally expressed doubt that this conduct is entitled to absolute immunity "as a matter of law." J.A. 110.

SUMMARY OF ARGUMENT

Petitioner argues that prosecutors should be subject to a Section 1983 damages suit for a "pre-arrest and pre-indictment investigation" that causes injury during "the later criminal proceedings." Pet. Br. i, 18-34. The court of appeals correctly rejected that argument. This Court held in *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), that a prosecutor is immune from a Section 1983 damages suit for actions taken "in initiating a prosecution and in presenting the State's case." A prosecutor's "pre-indictment" investigatory activities are part of that process of initiating and presenting a prosecution. Indeed, petitioner seeks damages for those activities precisely because they resulted in his indictment, arrest, and detention pending trial.

Petitioner also argues that a prosecutor should be subject to a Section 1983 damages suit for public statements that allegedly caused petitioner injury in "the later criminal proceedings." Pet. Br. i, 18-34. Prosecutors are not entitled to absolute immunity for public statements concerning pending litigation. But even in the absence of immunity, petitioner's claims based on the prosecutor's public statements are not cognizable under Section 1983. To state a Section 1983 claim based on deprivation of liberty without due process of law, petitioner must allege that a state actor actually deprived petitioner of a recognized liberty and that the State's procedures were inadequate to protect petitioner from that deprivation. Petitioner's allegations fail to satisfy those requirements. The only deprivation of a liberty interest involved here—petitioner's pretrial confinement—resulted from the operation of the State's judicial process. Petitioner

has made no allegation that the State's bail procedures were inadequate to prevent prejudicial publicity from unlawfully impairing that interest.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PROSECUTORS ARE NOT SUBJECT TO SUIT UNDER SECTION 1983 FOR PRETRIAL ACTIVITIES THAT ALLEGEDLY INJURED PETITIONER IN THE LATER CRIMINAL PROCEEDINGS

A. Prosecutors Are Absolutely Immune From Suit For Actions Taken In Initiating A Prosecution And In Presenting The State's Case

Petitioner contends that the prosecutors in this case are subject to a Section 1983 damages action based on their "pre-arrest and pre-indictment investigation" that caused injury in "the later criminal proceedings." Pet. Br. i, 18-34. This Court's decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), has already resolved that issue. The prosecutors are absolutely immune from petitioner's suit, because the suit seeks damages from the prosecutors for "initiating a prosecution" and "presenting the State's case." *Id.* at 431.

1. The question in *Imbler* was whether "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983 for alleged deprivations of the defendant's constitutional rights." 424 U.S. at 410. The prosecutor, Richard Pachtman, had investigated a homicide and prosecuted Paul Imbler, relying on testimony from the primary identification witness, Alfred Costello. See *id.* at 411-412. After Imbler was convicted, Pachtman learned that Costello "was less trust-

worthy than he had represented originally to Pachtman and in his testimony." *Id.* at 412.

Imbler subsequently obtained release through a writ of habeas corpus. 424 U.S. at 413-415. He then filed a Section 1983 damages action against Pachtman, a police fingerprint expert, and other police officers, alleging that "a conspiracy among them unlawfully to charge and convict him had caused him loss of liberty and other grievous injury." 424 U.S. at 415-416. Imbler's specific allegations were remarkably similar to petitioner's allegations here:

> The gravamen of [Imbler's] complaint against Pachtman was that he had "with intent, and on other occasions with negligence" allowed Costello to give false testimony as found by the District Court, and that the fingerprint expert's suppression of evidence was "chargeable under federal law" to Pachtman. In addition, Imbler claimed that Pachtman had prosecuted him with knowledge of a lie detector test that had "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of [the victim's] killer made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused upon him.

Id. at 416. The district court dismissed Imbler's complaint on the ground that Pachtman was protected by prosecutorial immunity, and the court of appeals affirmed. *Id.* at 416.

This Court granted Imbler's petition for a writ of certiorari and affirmed the court of appeals' judgment. It observed at the outset that although Section 1983 contains no express immunities, Congress had included by implication "those immunities which historically, and for reasons of public policy, had been

accorded to various categories of officials." 424 U.S. at 417-418, citing *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). The Court determined that the common law had long recognized "on principles of public policy" that prosecutors are absolutely immune from suits for malicious prosecution. 424 U.S. at 421-422, quoting *Yaselli* v. *Goff*, 12 F.2d 396, 406 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927) (per curiam). It concluded that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 424 U.S. at 424.

The Court expressly "delineate[d] the boundaries of [its] holding" by reference to the court of appeals' decision, which "emphasized that each of respondent's challenged activities was an 'integral part of the judicial process.'" 424 U.S. at 430, quoting from the lower court's opinion in the same case, 500 F.2d 1301, 1302 (9th Cir. 1974). The Court stated:

> We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.

424 U.S. at 430. The Court accordingly affirmed the court of appeals' judgment, stating that the prosecutor was immune from a Section 1983 suit for actions taken "in initiating a prosecution and in presenting the State's case." *Id.* at 431.

2. This Court's decision in *Imbler* squarely answers petitioner's argument that the prosecutors in this case are not entitled to absolute immunity for a "pre-arrest and pre-indictment investigation" that injured petitioner in "the later criminal proceedings." Pet. Br. i, 18-34. *Imbler* holds that a prosecutor is abso-

lutely immune from Section 1983 actions "in initiating a prosecution" as well as "in presenting the State's case." 424 U.S. at 431. As the court of appeals recognized, *Imbler* protects a prosecutor from suit not only for seeking an indictment and presenting evidence in court, but also for preparatory activities that cause injury because they culminate in a criminal prosecution. See J.A. 87-88, 103-104.

Petitioner argues that *Imbler* does not control here because a distinction can be drawn between a prosecutor's preparatory actions—specifically the purported "fabrication of evidence"—and the prosecutor's actions at trial. See Pet. Br. 20-21. That distinction is unavailing. Petitioner challenges the prosecutors' "pre-arrest and pre-indictment investigation" precisely because it resulted in an indictment and as a consequence of that indictment he was arrested, detained, and tried. See J.A. 19-20. *Imbler* bars such suits. As the court of appeals explained:

> It would be a hoax to proclaim immunity for presentation of testimony in court if the person aggrieved by that testimony may attack its preparation. Immunity is not limited to *un*prepared events at trial! * * * Immunities cover not only the core functions sought to be protected but also normal preparatory steps.

J.A. 104. See *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503-507 (1975) (holding that immunity under the Speech or Debate Clause extends to investigative actions "essential to legislating").[4]

[4] This Court explained in *Imbler* that absolute immunity is necessary to the judicial process, because the prosecutor must be free to "exercise his best judgment both *in deciding which suits to bring* and in conducting them in court." 424 U.S. at 424 (emphasis added). The Court specifically noted that "[t]he veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify." *Id.* at 426. "If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Ibid.*

Indeed, *Imbler* expressly addresses petitioner's argument. Imbler's complaint alleged that Pachtman, a forensic expert, and law enforcement officers engaged in a conspiracy "unlawfully to charge and convict." 424 U.S. at 415-416. See also First Amended Complaint, reproduced in 74-5435 J.A. 61-81. Imbler specifically asserted that Pachtman had acted with malice or negligence in preparing his prosecution, because he failed to investigate adequately Costello's credibility and he participated in the suppression or alteration of evidence. See p. 14, *supra*. See also 74-5435 J.A. 63, 64-69, 74, 76, 79.[5] The Court nevertheless affirmed Pachtman's entitlement to absolute immunity, holding that the specific instances of alleged prosecutorial misconduct "were intimately associated with the judicial phase of the criminal process, and thus were functions to which

[5] Significantly, Imbler's complaint charged that Pachtman participated in the conspiracy "commencing in January of 1961"—the date of the murder. 74-5435 J.A. 61, 63. The complaint stated that "[a]t all times during the said trial, and at times during the pre-trial investigatory phase thereof," Pachtman "direct[ed] police officers in traditionally exclusive police activity" and "was aided by officers doing acts within their agency." *Id.* at 69. The complaint also specifically alleged that Pachtman was not entitled to immunity because he was "acting as a police officer and directing police officer[s]." *Id.* at 70.

the reasons for absolute immunity apply with full force." 424 U.S. at 430.[6]

Imbler's complaint and petitioner's complaint are not materially different. Like Imbler, petitioner alleges that prosecutors, law enforcement personnel, and forensic experts "individually and in conspiracy, fabricated evidence against him and wrongfully arrested, imprisoned and prosecuted him." Pet. Br. 3; see J.A. 19-20. Both complaints allege that the prosecutors participated in procuring false testimony or exhibits and suppressing exculpatory evidence. Compare 424 U.S. at 416 with Pet. Br. 4-5; J.A. 7-11. The same result should obtain in both cases: The prosecutors are absolutely immune from a Section 1983 suit for "initiating a prosecution" and "presenting the State's case." *Imbler*, 424 U.S. at 431.[7]

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[6] As the Court explained, "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." 424 U.S. at 431 n.33. "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Ibid.* The Court nevertheless recognized that a prosecutor enjoys absolute immunity with respect to many of those matters. See 424 U.S. at 430 n.32 (holding that the prosecutor's out-of-court "effort to control the presentation of his witness' testimony" is "a task fairly within his function as an advocate"); *id.* at 431 n.34 (holding that absolute immunity applies to claims of suppression of evidence).

[7] That result is consistent with the underlying purpose of absolute immunity: to protect the integrity of the judicial process. See *Imbler*, 424 U.S. at 422-423. The courts must rely on a public officer—the prosecutor—to make the initial inquiry into allegations of criminal misconduct and to determine

As the Court recognized, the prosecutor's immunity for pre-indictment actions is not all-encompassing. "At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court." *Imbler*, 424 U.S. at 431 n.33.[8] "Drawing a proper line between these functions may present difficult questions," *ibid.*, but it presents no difficulty in this case. At a minimum, *Imbler* holds that a prosecutor is absolutely immune with respect to investigatory activities that cause harm solely because they culminate in a criminal prosecution. That holding controls this case.[9]

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whether to initiate a criminal prosecution. The process will suffer if the prosecutor may be sued based on his evaluation of the evidence. See 424 U.S. at 426-427. The complaints filed in these cases illustrate the need for immunity. In *Imbler*, the plaintiff argued that Pachtman should have conducted a *more* aggressive investigation into Costello's background, see *id.* at 414 n.8, 416, while in this case, petitioner argues that the prosecutors were *too* aggressive in seeking out expert witnesses, see J.A. 8-9.

[8] For example, this Court ruled in *Burns* v. *Reed*, 111 S. Ct. 1934 (1991), that a prosecutor is absolutely immune when "appearing before a judge and presenting evidence in support of a motion for a search warrant," *id.* at 1942, but not when "giving legal advice to the police," *id.* at 1944-1945. Similarly, the court of appeals held in this case that the prosecutors are not absolutely immune from allegations that they "coercively interrogated" petitioner, J.A. 93, or that they actually participated in an unlawful arrest, J.A. 109.

[9] Petitioner responds to *Imbler* in part by arguing, in effect, that it should be overruled. Petitioner asserts that "the Court should hold that a public prosecutor's malicious decision to seek an indictment, in the absence of probable cause, but

B. Respondent Fitzsimmons Is Not Subject To Section 1983 Liability For His Public Statements Where The Alleged Deprivation Of Liberty Is Attributable To The Operation Of The State's Judicial Process

Petitioner also contends that former State's Attorney Fitzsimmons is subject to a Section 1983 damages action based on his "out of court public statement[s]" that caused injury in "the later criminal proceedings." Pet. Br. i, 18-34. The court of appeals was correct in concluding that the prosecutor is not subject to suit for those statements. We disagree, however, with the court's characterization of the issue as one of "absolute immunity." J.A. 106-109. The prosecutor's protection from suit in this situation arises not from the Court's recognition that Section 1983 contains implicit immunities, but rather from the explicitly limited reach of Section 1983 to the conduct at issue.

1. a. Section 1983 provides a damages remedy against individuals who, acting under color of state law, deprive another of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. 1983. See, *e.g.*, *Soldal* v. *Cook County*, No. 91-6516 (Dec. 8, 1992), slip op. 4 n.6. As this Court recently explained in *Burns* v. *Reed*, 111 S. Ct. 1934 (1991), Section 1983 "is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" 111 S. Ct. at 1938, quoting *Imbler*, 424 U.S. at 418. Hence, courts ordinarily examine whether immunity exists as part of the inquiry into whether the plaintiff has stated a valid claim for relief.

As we have explained, *Imbler* makes clear that a prosecutor is immune from a Section 1983 suit for investigatory actions that cause harm solely because they result in a prosecution. See pp. 13-19, *supra*. The same cannot be said with respect to a prosecutor's public statements at a press conference. A prosecutor's public statements may serve an important community function by providing official information of public interest, but they are not part of the process of "initiating a prosecution" and "presenting the State's case," nor are they otherwise "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430-431. A prosecutor's actions in providing public information, like his actions in providing legal advice to police, would normally appear to warrant only qualified immunity. See *Burns* v. *Reed*, *supra*.

b. A conclusion that absolute immunity is unavailable—or that even qualified immunity is unavailable—does not mean, however, that petitioner's claim is actionable under Section 1983. As this Court has explained in other Section 1983 suits, the "initial inquiry" must focus on whether the conduct complained of "deprived a person of rights, privileges,

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with the presence of an improper ulterior motive, is actionable." Pet. Br. 45. That result would invalidate *Imbler*'s precise holding that a prosecutor is immune "in initiating a prosecution *and* in presenting the State's case." 424 U.S. at 431 (emphasis added). As this Court has explained, respect for controlling precedent is a "cardinal and guiding principle" in statutory interpretation. *California* v. *FERC*, 495 U.S. 490, 499 (1990). No reason exists to depart from that principle here. See, *e.g.*, *Hilton* v. *South Carolina Public Rys. Comm'n*, 112 S. Ct. 560, 565 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); see also *Burns*, 111 S. Ct. at 1949 (Scalia, J., concurring in part and dissenting in part).

or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981). Cf. *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1794 (1991) (affirming the dismissal of a *Bivens* complaint on qualified immunity grounds, because "Siegert not only failed to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all").

This Court's decision in *Baker* v. *McCollan*, 443 U.S. 137 (1979), has particular relevance to that inquiry in this case, wherein petitioner alleges "false arrest and imprisonment, in violation of [petitioner's] fourth and fourteenth amendment rights." J.A. 19. In *Baker*, the plaintiff brought a Section 1983 suit predicated on wrongful arrest and detention. The Court explained that "the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty." 443 U.S. at 142-143, citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). See also *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991). It further stated:

> Since an adversary hearing is not required, and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him during trial.

443 U.S. at 143. In those circumstances, a Section 1983 action predicated on a Fourth Amendment violation must focus "on the validity of the warrant under which he was arrested." *Ibid.*[10]

The Court also explained, however, that a suspect cannot be "detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." 443 U.S. at 144. It observed:

> We may even assume, *arguendo*, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty . . . without due process of law."

Id. at 145. It emphasized, however:

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law."

Ibid. The Court concluded that the plaintiff in that case, who was arrested on a warrant and detained without a judicial hearing for three days, was "deprived of no rights secured under the United States Constitution" and therefore had "no claim cognizable under § 1983." *Id.* at 146-147.

2. Petitioner's allegations concerning Fitzsimmons' public statements do not satisfy the requirements that *Baker* identifies as essential for stating a

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[10] "The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." 443 U.S. at 145.

claim cognizable under Section 1983. Petitioner's complaint alleges violations of the Fourth and Fourteenth Amendments on the ground that the prosecutors' acts and omissions—presumably including Fitzsimmons' statements—led to his "false arrest and imprisonment," "violated [petitioner's] right to a fair trial, were done to publicly prejudice and defame him," and "caus[ed] his continued imprisonment." J.A. 19. But taking the factual allegations of petitioner's complaint as true, Fitzsimmons' public statements did not as a matter of law deprive petitioner of any interest protected by the Fourth or Fourteenth Amendment.

a. Fitzsimmons' statements plainly provide no basis for petitioner's Fourth Amendment claim relating to his "false arrest." According to petitioner's complaint, the grand jury indicted petitioner *prior* to Fitzsimmons' statements. J.A. 12. The indictment supplied probable cause for the arrest. Indeed, Illinois law provides that upon the filing of an indictment in open court, "the court shall immediately issue a warrant for the arrest of each person charged with an offense." Ill. Ann. Stat. ch. 38, para. 111-2(d) (Smith-Hurd 1980 & Supp. 1992). Thus, Fitzsimmons' statements announcing the indictment are factually and legally irrelevant to any Fourth Amendment claim. See *Baker* v. *McCollan*, *supra*.

b. Fitzsimmons' statements also do not support petitioner's claim under the Fourteenth Amendment alleging defamation. As the court of appeals concluded—and petitioner now concedes, Pet. Br. 39—Fitzsimmons' statements are not actionable under Section 1983 to the extent they merely defamed him. See J.A. 89, 105-106. This Court recently reiterated

that mere "injury to reputation" does not invade a "liberty" interest protected by the Fourteenth Amendment. See *Siegert*, 111 S. Ct. at 1794; *Paul* v. *Davis*, 424 U.S. 693, 708-709 (1976). "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert*, 111 S. Ct. at 1794.

c. Petitioner's claim that Fitzsimmons' statements influenced his bail also fails to identify a constitutional deprivation. To be sure, a criminal defendant has a constitutionally recognized liberty interest in freedom from confinement. See *United States* v. *Salerno*, 481 U.S. 739, 746-752 (1987). The Fourteenth Amendment is implicated, however, only when the deprivation of that liberty interest is accomplished "without due process of law." *Baker*, 443 U.S. at 145. As this Court indicated in *Baker*, the question whether the deprivation of liberty amounts to a Fourteenth Amendment violation "depend[s] on what procedures the State affords." *Ibid.*

This Court has repeatedly held that a Section 1983 plaintiff cannot sue a state actor based on an alleged deprivation of the plaintiff's property without due process of law if the State has put in place adequate pre-deprivation procedures or has provided an adequate post-deprivation remedy. See *Hudson* v. *Palmer*, 468 U.S. 517, 530-536 (1984) (post-deprivation remedy for intentional destruction of property); *Parratt* v. *Taylor*, *supra* (post-deprivation remedy for negligent destruction of property); see also *Parratt*, 451 U.S. at 537-538 (discussing pre-deprivation "process"). As *Parratt*'s citation to *Baker* suggests, 451 U.S. at 537, the same principle should apply to alleged deprivations of liberty without due process of law.

Under the analysis set forth in those cases, petitioner cannot maintain a Section 1983 action by simply alleging that Fitzsimmons made prejudicial statements and that those statements were the cause in fact of petitioner's detention pending trial. To state a Fourteenth Amendment claim, he must also allege that his freedom was restrained "without due process of law." As this Court emphasized in *Parratt*, a challenge to the adequacy of the State's procedures is crucial to a Section 1983 "due process" claim. See 451 U.S. at 543-544. Furthermore, once such a challenge is made, the inquiry is whether the State's procedures satisfy the Fourteenth Amendment:

> Although the state remedies may not provide the [plaintiff] with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

451 U.S. at 544. See also *Hudson*, 468 U.S. at 533-536.

In this case, petitioner's suit cannot go forward without a colorable claim that Illinois has failed to provide adequate procedures to protect against the setting of oppressive bail in response to pretrial publicity. Petitioner has made no such claim. The court of appeals seemed to recognize that defect, but characterized the issue as one of absolute immunity.. See J.A. 90, 106 ("Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge."). It is more accurate to say that petitioner's bail claim is defective for the same reason as his

defamation claim—it fails to state a cause of action cognizable under Section 1983.[11]

d. Petitioner's claim that he was denied a "fair trial" is similarly flawed. The Fourteenth Amendment does not contain an abstract guarantee of a "fair trial." Rather, it provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." When the State seeks to impose criminal punishment, a "fair trial" is the process that is due. See *Baker*, 443 U.S. at 145. In this case, petitioner cannot claim that Fitzsimmons' statements deprived him of any liberty interest based on

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[11] The Due Process Clause allows courts to detain criminal suspects pending trial, based on either the suspect's risk of flight or the danger he poses to others. See *United States* v. *Salerno*, *supra*. Significantly, Illinois law provides extensive procedural protections to a suspect in the bail process. See Ill. Ann. Stat. ch. 38, para. 110-1 to 110-18 (Smith-Hurd 1980 & Supp. 1992). The law in effect at the time petitioner was arrested directed the court to set bail in an amount that "shall be: (1) Sufficient to assure compliance with the conditions set forth in the bail bond; (2) Not oppressive; (3) Commensurate with the nature of the offense charged; (4) Considerate of the past criminal acts and conduct of the defendant; and (5) Considerate of the financial ability of the accused." Ill. Ann. Stat. ch. 38, para. 110-5(a) (Smith-Hurd 1980). At the time of petitioner's arrest and thereafter, Illinois law has provided mechanisms for granting, reducing, increasing, or denying bail during the judicial proceedings. See Ill. Ann. Stat. ch. 38, para. 110-6 (Smith-Hurd 1980 & Supp. 1992). Furthermore, a detained defendant could obtain review of the bail decision either through habeas corpus, see *People* v. *Harris*, 232 N.E.2d 721 (Ill. 1967), or through statutory review mechanisms, Ill. Ann. Stat. ch. 38, para. 110-6.1(g) (Supp. 1992). Petitioner's complaint does not acknowledge those protections or allege that they were inadequate to prevent prejudicial pretrial publicity from impairing the bail decision.

the outcome of his criminal trial, because he was not convicted. The jury failed to reach a unanimous verdict and the resulting mistrial did not curtail petitioner's liberty.[12]

Even if petitioner had been convicted, the mere allegation that the prosecutor made prejudicial pretrial statements would be insufficient to state a Section 1983 "due process" claim. Like a challenge to his bail, petitioner's challenge to a sentence of imprisonment could not go forward without a colorable claim that Illinois has failed to provide adequate procedures to prevent pretrial publicity from impairing a defendant's liberty interest. See *Hudson*, 468 U.S. at 533-536; *Parratt*, 451 U.S. at 543-544. As the court of appeals recognized, the courts have various mechanisms at their disposal to prevent pretrial publicity from prejudicing a defendant's rights. See J.A. 90. Petitioner has made no claim that the procedures Illinois provides are ineffective.[13]

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[12] Although petitioner's complaint alludes to the expense and mental anguish he experienced in defending himself in a criminal action, J.A. 20, those costs are an unavoidable part of the trial process. This Court has never held that a criminal suspect has a constitutionally protected liberty interest in freedom from such costs. Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("the expense and annoyance of litigation is 'part of the social burden of living under government'") (quoting *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938)).

[13] Trial courts exercise broad power and wide discretion in ensuring that jurors are able to discharge their obligations impartially. See, *e.g.*, *Mu'Min* v. *Virginia*, 111 S. Ct. 1899, 1906 (1991); Ill. Ann. Stat. ch. 38, para. 114-6 (Smith-Hurd 1980 & Supp. 1992) (change of venue provisions). Indeed, for that reason, a convicted defendant may obtain reversal of a trial court's findings of juror impartiality "only for manifest error." *Mu'Min*, 111 S. Ct. at 1907, quoting *Patton* v. *Yount*, 467 U.S. 1025, 1031 (1984). It would be anomalous if a defendant who was *not* convicted could nevertheless seek damages from state actors under Section 1983 by merely alleging prejudicial pretrial publicity without regard to the procedures that the State has put in place to ensure an impartial jury.

Simply put, even if petitioner's allegations relating to Fitzsimmons' public statements are true, they fail to show that petitioner was deprived of liberty "without due process of law." Petitioner's arguments (Pet. Br. 28-30) that a Section 1983 action is needed to deter prosecutors from creating adverse publicity are beside the point. Section 1983 provides a damages remedy only where the plaintiff alleges a constitutional wrong, and petitioner's contentions concerning Fitzsimmons' statements fail to state an actionable claim.[14]

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[14] Mechanisms other than damage remedies are available to prevent pretrial publicity from affecting the outcome of judicial proceedings. For example, Justice Department regulations strictly limit the public announcements of federal prosecutors. See 28 C.F.R. 50.2. And in addition to the court's power to protect a defendant from adverse publicity through "voir dire, change of venue, jury instructions and, in extreme cases, reversal," a court may subject prosecutors to disciplinary proceedings in appropriate cases. *Gentile* v. *State Bar*, 111 S. Ct. 2720, 2748 n.6 (1991) (Rehnquist, C.J., concurring in part and dissenting in part).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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